Nothing of the kind as said by Buckley J. had occurred in the case of Jordache jeans in Singapore. There is no evidence to show that immediately after the launch the Jordache jeans made a great impact in the jean market and immediately acquired a reputation.

I now make an order as follows: first, an injunction restraining the Defendants by themselves, their officers, servants or agents or any of them or otherwise from infringing or causing or enabling or assisting any other persons to infringe the Plaintiffs' trade mark, "Jordache"; secondly, delivery to the Plaintiffs for destruction of all labels, marks, advertisements, documents and other materials bearing the trade mark, "Jordane", and thirdly, an enquiry as to damage, if any, suffered by the Plaintiffs and occasioned by such infringement of trade mark. On the question of costs, if the Plaintiffs had proceeded with a claim only for infringement of their trade mark, as they should have done so, the trial would not have been so prolonged. As it turned out, this trial lasted for seven full days and a great deal of time was devoted to the question of passing off. Since they failed in their claim for passing off, the Plaintiffs should not be allowed the full costs of this action. Accordingly, I allow to the Plaintiffs only two thirds of the costs of this action.

Order accordingly

Solicitors: *Drew & Napier; Chor Pee & Co.*

MALAYSIAN REPORTS

CITY INVESTMENT SDN. BHD. v. KOPERASI SERBAGUNA CUEPACS TANGGUNGAN BHD.

[F.C. (Lee Hun Hoe C.J. (Borneo), Mohamed Azmi & Abdoolcader F.JJ.) August 23, 24 & 29 & December 17, 1984]

[Kuala Lumpur – Federal Court Civil Appeal No. 30 of 1984]

Contract – Housing development contract – Sale of immovable property – Breach of Contract – Specific performance – Damages – Remoteness – Specific performance of part of contract – Housing Developers Rules, 1970, r.12 – Specific Relief Act, 1950, ss. 3, 11, 14 & 18.

Land Law – Sale of immovable property – Breach of contract – Specific performance.

Housing Developers – Breach of contract – Specific performance – Housing Developers (Control and Licensing) Act, 1966 – Housing Developers Rules, 1970, r. 12 – Specific Relief Act, 1950, ss. 3, 11, 14 & 18.

In this case the appellants were the registered owners of a piece of land which they decided to develop into housing lots. They entered into two separate agreements with the respondents for the sale of a portion of the land to be developed. In the first agreement the appellants agreed to sell and the respondents agreed to buy 60 terrace houses and at the request of the respondents the appellants also agreed to appoint themselves or a third party as licensed developer with whom the respondents could execute a building contract for the construction of the terrace houses. The respondents have paid the sum of $720,000 to the appellants consisting of $300,000 as land price and $420,000 as development price. In the second agreement the appellants agreed to sell and the respondents agreed to buy 25 subdivided lots, 15 semi-detached lots and 11 bungalow lots. The respondents have paid $426,300/- for these lots comprising of $172,000/- as land price and $254,300 as development price. Out of the 85 lots sold, the appellants have transferred to the respondents only one terrace lot under the first agreement and one semi-detached lot under the second agreement. Ten of the bungalow lots under the second agreement were found to be commercially useless as it would cost about $13 million to level the land. The learned trial judge held that the first agreement was a sale of land with houses and therefore caught by the Housing Developers legislation. He found that the appellants were in breach of both the written agreements for their failure to transfer the various lots to the respondents. In respect of the first agreement he ordered specific performance for the transfer of the remaining 59 terrace-lots to the respondents and he also awarded compensation for consequential loss which included, *inter alia,* damages for additional costs in constructing the 60 terraced houses and $187,200/- as indemnity under the Housing Developers Rules, 1970. In regard to the Second agreement he ordered specific performances for the transfer of the remaining 13 semi-detached lots and 1 bungalow lot. For the 10 useless bungalow lots the appellants were ordered to refund the contract price of $203,000/- with interest. In addition to

specific performance the learned Judge also ordered damages for increased cost of construction – $117,000/- for 9 semi-detached houses and $148,500/- for 11 bungalows.

The appellants appealed against the finding of liability for breach of contract on their part as well as against the reliefs granted particularly the decree ordering specific performance of part of the contract as well as awarding damages. There was also a cross-appeal by the respondents on quantum and the refusal by the learned judge to award them certain ancillary reliefs.

Held: (1) the learned Judge did not err in law or in fact when he concluded that the first agreement to sell land with houses was binding on the parties and was not dependent on the execution of another building contract. The first agreement should therefore in law be construed as a contract of sale and purchase of land with houses. Moreover the agreement constituted a statutorily binding "housing development" contract and the appellants were a housing developer within the meaning of section 3 of the Housing Developers (Control and Licensing) Act, 1966;

(2) in the absence of any certificate by the Controller waiving or modifying the date of delivery of vacant possession under rule 12(2) of the Housing Developers Rules, the appellants have committed a breach of contract by failing to deliver vacant possession by May 24, 1978;

(3) the refusal of the respondents to sign a building contract with the appellants under clause 3 of the agreement was justified in view of the two offending clauses objected to by them. Accordingly the defence raised by the appellants that they were prevented from constructing the houses as a result of the respondents' failure to enter into the building contract cannot be sustained;

(4) in regard to the second agreement, the learned judge was right when he found the appellants to be in breach of contract by transferring to the respondents only one of the 25 building lots;

(5) in this case there is a part of the first agreement viz. the transfer of the terrace lots which taken by itself could and ought to be specifically performed and this part stood on a separate and independent footing from the other part of the contract, *viz.* the construction part which clearly could not and should not be specifically performed as it would involve the court with lengthy and laborious supervision as to its performance;

(6) section 14 of the Specific Relief Act does not apply to the second agreement although it concerns only the sale of vacant land. It can therefore be specifically enforced under section 11 of the Act and in addition damages can be awarded under section 18(3);

(7) in respect of the 10 useless bungalow lots, the learned Judge has exercised his discretion judicially by not ordering specific performance but instead ordering the appellants to refund the contractual price and also awarding consequential damages arising from the breach of contract;

(8) the ground of appeal that the respondents were not entitled to specific performance as well as compensation for damages must therefore fail;

(9) there was no reason to interfere with the amount awarded by the trial judge as damages and the appeal against quantum by the appellants must fail;

(10)as regards the cross-appeal of the respondents, the learned Judge was justified in assessing the indemnity for 18 months in accordance with the Housing Development Rules;

(11)under section 18(4) of the Specific Relief Act the method of assessing damages is left to the discretion of the trial judge. Since the method has not been shown to be wrong in principle, his award must stand.

[Editorial Note: For other applications relating to this matter see [1983] 2 M.L.J. 33 and [1983] 2 M.L.J. 366].

Cases referred to:

(1) *National Coal Board* v. *Wm Neill & Son (St. Helens) Ltd.* [1984] 1 All E.R. 555.
(2) *Aldrington Garages* v. *Fielder* [1978] 7 H.L.R. 52, 62.
(3) *Johnson* v. *Moreton* [1978] 3 All E.R. 37, 56.
(4) *S.E.A. Housing Corporation* v. *Lee Poh Choo* [1982] 2 M.L.J. 31, 34.
(5) *Victoria Laundry (Windsor) Ltd.* v. *Newman Industries* [1949] 1 All E.R. 997, C.A.
(6) *Mama* v. *Sasson* (1928) L.R. I.A. 360, 371-375.
(7) *Graham* v. *Krishna Chunder Dey* [1924] L.R.I.A. 90, 92.
(8) *Parthasarathi* v. *Venkata Kondiah* A.I.R. 1965 Mad. 188.
(9) *Sultan Kani Rowthen* v. *Md. Meera Rowthen* A.I.R. 1929 Mad. 189, 190.
(10)*Hiralal Lachmiram Pardeshi* v. *Janardan Govind Nerlekar* A.I.R. 1938 Bom. 134.
(11)*Harendra* v. *Nandalal* A.I.R. 1933 Cal. 98.

FEDERAL COURT.

R.R. Sethu (Porres P. Royan with him) for the appellants.

Humfrey Ball (N. Ramachandran and Datin Saraswathy Devi) for the respondents.

Cur. Adv. Vult.

Mohamed Azmi F.J. (delivering the Judgment of the Court): This is a claim by respondents/ purchasers for specific performance of immovable property and also for damages and other ancillary reliefs for breach of contract. The appellants/ vendors, a Limited Company, were the registered owners of 49.871 acres of agricultural land held under Grant 15947 for Lot 3902 in the Mukim of Rasah in the District of Seremban. Some time in

1976 they decided to develop the whole land and for this purpose they applied to the appropriate authority for conversion and subdivision of the property into housing lots. In the meantime they entered into two separate agreements both dated November 24, 1976 with the purchasers – a Co-operative Society of civil servants – for the sale of a small portion of the land to be developed. In the first agreement the vendors agreed to sell and the purchasers agreed to buy 60 terraced lots, each having an approximate area of 1,760 sq. ft. and at the request of the purchasers the vendors also agreed to appoint themselves or a third party as a licensed housing developer with whom the purchasers could execute a building contract for the construction of terraced houses on each of the said lots. The purchasers have paid a sum of $720,000/- to the vendors consisting of $300,000/- as land price and $420,000/- as development price. The construction price which the purchasers have yet to pay is $840,000/-. In the second agreement the vendors agreed to sell and the purchasers agreed to buy 25 subdivided lots – 14 semi-detached lots of 5,000 sq. ft. each and 11 bungalow lots of 7,000 sq. ft. per lot. The purchasers have also paid $426,300/- for these lots comprising of $172,000/- as land price and $254,300/- as development price. The purchasers have thus paid a total sum of $1,146,300/- to the vendors under the terms of the two agreements. It is common ground that the second agreement only concerns sale of vacant developed lots, but there is a serious dispute regarding the first agreement as to whether it should be construed as a sale of vacant developed lots only as averred by the vendors, or sale of developed lots with houses as alleged by the purchasers so as to bring the agreement within the ambit of the Housing Developers (Control and Licensing) Act, 1966. The learned trial Judge held that the first agreement is a sale of land with houses and therefore caught by the Housing Developers legislation. Out of 85 lots sold, the vendors have transferred to the purchasers only one terraced-lot under the first agreement and one semi-detached lot under the second agreement. Ten of the bungalow lots under the second agreement were found to be commercially useless as it would cost about $13 million to level the land. The learned Judge found the appellants/vendors were in breach of both the written agreements for their failure to transfer the various lots to the purchasers. In respect of the first agreement, he ordered specific performance for the transfer of the remaining 59 terraced-lots to the purchasers and he also awarded compensation for consequential loss which, *inter alia,* included $960,000/- damages for additional costs of constructing the 60 terraced houses and $187,200/- as indemnity under Rule 12(1) (r) of the Housing Developers Rules 1970. As to the second agreement, specific performance was also ordered for the transfer by the vendors to the purchasers of the remaining 13 semi-detached lots and 1 bungalow lot. For the 10 useless bungalow lots, the vendors were ordered to refund the contract price of $203,000/- with interest. In addition to specific performance the learned Judge also awarded damages for increased cost of construction – $117,000/- for 9 semi-detached houses and $148,500/- for 11 bungalows i.e. for loss of opportunity to have the bungalows built according to 1978 costs. The vendors have appealed against the finding of liability for breach of contract on their part and as well as against the reliefs granted to the purchasers particularly the decree ordering specific performance of part of the contract and as well as awarding damages which according to them is prohibited by section 14 of the Specific Relief Act 1950 (Revised 1974). There is also a cross-appeal by the purchasers on quantum and the refusal of the learned Judge to award them certain ancillary reliefs. On the issue of liability for breach of the first agreement, it is contended by the appellants/vendors that on the true construction of the document the contract involves only the sale of vacant developed lots. Their liability is merely to assist the respondents/purchasers in the construction of the houses and that unless the building contract as envisaged under clause 3 is executed by the purchasers, the vendors are not obliged to build the houses. It is said that preamble (E) read with clauses 2 and 3 support the appellants' argument that the construction part of the agreement is not binding unless the clause 3 contract becomes enforceable. Since the respondents/purchasers have refused to execute the clause 3 building contract, the Housing Developers Act cannot be applicable.

The first issue to be determined in this appeal is whether the learned Judge erred in law and in fact in holding that the first agreement is a "housing development" contract within the meaning of the Housing Developers Act and the 1970 Rules made thereunder. In this connection the learned Judge made the following finding:–

"On a true construction of Agreement No. 1, I find, first, that the Vendors were selling both Terrace Lots and Terrace Houses by Agreement No. 1; secondly the Agreement No. 1 was within the purview of the Act and the Rules, and

thirdly the Agreement No. 1 constituted or incorporated a binding, concluded and sufficiently well-defined building contract in regard to the Terrace Houses, not dependent for its enforceability on the subsequent signing of the draft building contract, (A 40), which merely reflected the desire of the parties hereto as to the form in which their transaction was to take place. Parties hereto would be deemed to be bound by those statutorily mandatory provisions such as those in rule 12 of the Rules as if the same were engrafted or added to the Agreement No. 1 by consent."

Mr. Sethu, counsel for the appellants, strenuously argued that the first agreement is only for the sale of vacant land and not for housing development. He contended that written agreement cannot be construed by subsequent events but must be construed as at the date of its execution. The agreement was executed in 1976 and merely because the appellants had appointed themselves as 'the developer' on April 12, 1978 under clause 2 read with preamble (E), this cannot transform the agreement from sale of land albeit developed land into a housing development agreement as envisaged under the Act. According to the appellants, the key factor in clause 2 which will be reproduced is that it does not identify the developer. The appellants could either appoint themselves or any third person to be the licensed housing developer. Preamble (E) and clauses 2 and 3 are in the following terms:

"(E) The Purchaser has requested and the Vendor has agreed to appoint a Licensed Housing Developer with whom the Purchaser can execute a Building Contract for the construction of the proposed building on each of the said Plots."

"(2) Within two (2) months commencing on the date of the receipt by the Vendor of the written notification by the Appropriate Authorities of the approval of the conversion and subdivision of the said Land, the Vendor shall appoint a Licensed Housing Developer (hereinafter referred to as "the Developer") for the construction of the proposed building in accordance with the provisions and requirements of the Housing Developers (Control and Licensing) Act, 1966 and the rules thereunder and subject to the provisions and requirements of any Act, Enactment, Ordinance, by-law or regulation for the time being in force and the sanctions of the Appropriate Authorities, for the sum specified in Section (9) of the First Schedule hereto (hereinafter referred to as "the Construction Price").

(3) The Purchaser hereby covenants to enter into a Building Contract with the Developer for the construction of the proposed building for the Construction Price within two (2) months commencing on the date of the receipt by the Purchaser of the Vendor's notice in writing of the appointment of the Developer."

The construction price under the first schedule is at $14,000/- per terraced house – thus making a total of $840,000/- for 60 units (see page 277 of appeal record).

The general principle of construction of contract applies to all contracts whether they are building contracts or not and in each case the meaning of any clause in a particular contract has to be ascertained by looking at the contract as a whole and giving effect so far as possible to every part of it (see *National Coal Board* v. *Wm Neill & Son (St Helens) Ltd)*[1] Mr. Sethu has drawn our attention to page 560, the judgment of Piers Ashworth Q.C. which states:–

"The first two issues involve the construction of the contract. I bear in mind the principles of construing a contract. The relevant ones for the purpose of this case are: (1) construction of a contract is a question of law; (2) where the contract is in writing the intention of the parties must be found within the four walls of the contractual documents; it is not legitimate to have regard to extrinsic evidence (there is, of course, no such evidence in this case); (3) a contract must be construed as at the date it was made: it is not legitimate to construe it in the light of what happened years or even days later; (4) the contract must be construed as a whole, and also, so far as practicable, to give effect to every part of it."

We have no quarrel with the principle of construction that a contract must be construed as at the date it was made. To ascertain whether this principle can assist the appellants' case, it is necessary to consider whether without clause 3 of the contract being executed, the first agreement can nevertheless constitute a binding contract to sell land with houses. The effect of preamble (E), clauses 2 and 3 is that the appellants agreed to appoint themselves or a third party as a licensed housing developer to construct the houses on the 60 terraced-lots; that the appointment should be made by the appellants within two months from the date of receipt of approval of conversion and subdivision of the whole land; that the developer so appointed shall construct the terraced houses in accordance with the 1966 Act and 1970 Rules for the sum of $840,000; and the respondents agree to enter into a building contract with the said developer. The question is, what exactly is the purpose and the nature of clause 3 of the building contract that is envisaged should the appellants appoint themselves as 'the developer' which in fact turns out to be the case? Indeed, could a third party be appointed at all as a housing developer, and what really would be the purpose of such a contract whether it is executed with the appellants or a third party? The

naming of the developer by the appellants under clause 2, in our view, serves no real purpose as it is difficult to envisage how a third party can be appointed as the developer in the housing scheme except perhaps as a sub-contractor or agent of the appellants since both the land price and the development price have already been paid by the respondents to the appellants. Further, the construction price of $840,000/- together with other charges have already been finalized in the first schedule to the Sale and Purchase Agreement so as to leave the respondents with nothing of importance to negotiate with clause 3 developers be they the appellants or any other licensed housing developer. Reading the agreement together with the four schedules as a whole, it is difficult and perhaps impossible to disagree with the conclusion of the learned Judge that the agreement is not purely for the sale and purchase of land but also for 60 terraced houses as alleged in paragraph 2 of the respondent's Statement of Claim. Otherwise there is no conceivable purpose in the appellants being given so much powers in the development and construction of the houses. Effect must be given to all these terms and not merely to clauses 2 and 3. For instance under clause 24, the first, second, third and fourth schedules must be taken, read and construed as essential parts of the agreement. Separate costs of land, development and construction have been agreed under the first schedule, and as stated earlier, the land price and development price have in fact been paid to the appellants. The architect's standard plan of the terraced houses, their specifications and the site plan have also been agreed and finalized in the second, third and forth schedules respectively. If the agreement is intended purely for the sale of vacant developed land, there is also no purpose in providing under clause 28.2 that the appellants shall in their absolute discretion appoint any architect or consulting engineer of their own choice without reference to the respondents, and for the respondents to be bound by such appointments and any decision or certificate of such architect or engineer. This and other provisions in the agreement including the four schedules can leave no room for doubt that on the true construction of the written instrument, it is an agreement for sale and purchase of land with houses and it cannot be said that on the basis of preamble (E) the appellants were merely assisting the respondents in the construction of the houses. In fact preambles (B) and (C) of the agreement make reference to "building lots" and preamble (D) to "the proposed building". As correctly pointed out by Mr. Humfrey Ball in his submission, even if a third party had been appointed as a developer he would get his money from the appellants and not from the respondents and he would be under the effective control of the appellants under clause 28. As stated elsewhere in this judgment, the terms for the construction of the houses are already covered fully by the executed agreement and it is not dependent on the draft building contract under clause 3. The appellants and the respondents have already bound themselves contractually under the main agreement in all material aspects of the construction of the terraced houses. Therefore the learned Judge did not err in law or in fact when he concluded that the first agreement to sell land with houses was binding on the parties and not dependent on the execution of another building contract under clause 3 which in effect became entirely unnecessary when the appellants appointed themselves as 'the developer'. We therefore reject the appellants' submission that there must be execution of the clause 3 contract before there can be a breach.

There is a second and stronger ground why the first agreement should in law be construed as a contract of sale and purchase of land with houses. In our judgment even if the execution of the clause 3 contract is intended by the parties to be crucial and a condition precedent to the construction part of the agreement, such intention has been rendered nugatory by force of the housing developers legislation. The agreement as it stands constitutes a statutorily binding 'housing development' contract and the appellants a 'housing developer' within the meaning of section 3 of the Housing Developers (Control and Licensing) Act 1966, the relevant parts of which provide:—

> "3. In this Act unless the context otherwise requires —
>
> "housing developer" means any person, body of persons, company, firm or society (by whatever name described) engaged in or carrying on or undertaking a *housing development or desirous of doing so;*
>
> "housing development" means the business of developing . . . . . more than four units of housing accommodation which will be or are erected by such development; and for the purposes of this definition "develop" means to construct or cause to be constructed, and includes the carrying on of any building operations for the purpose of constructing housing accommodation in, on, over or under any land with the view of selling the same or the land which would be appurtenant to such housing accommodation."

The non-execution of the clause 3 contract is therefore not a crucial factor in construing the

agreement as a contract of sale and purchase of land with houses. The agreement when construed as a whole at the date of its execution in 1976 shows a clear intention by the parties that the appellants are at all material times desirous of undertaking, or carrying on, or engaging themselves in the construction of the 60 terraced-houses within the meaning of "housing developer" and "housing development" as defined in the Act. Thus, what is crucial is the desire of the appellants to be a housing developer and this is clearly expressed in the enabling provision in clause 2 read together with the rest of the agreement particularly clauses 24 and 28.2 and the contents of the four schedules. This "desirous of doing so" on the part of the appellants as provided in the definition of "housing developer" is sufficient to bring them and the agreement within the purview of the Act. It makes no difference that the appellants only appointed themselves as the actual housing developer later in 1978 after the conversion and subdivision of the land had been approved. From the agreement there can be no doubt that the appellants are clearly desirous of undertaking a housing development of more than four units of housing accommodation which will be erected with a view to selling the same to the respondents for the benefit of their members. This desire has subsequently crystallized into actual deed when they appointed themselves as the developer. In the circumstances, the terms and conditions under the Housing Developers Rules 1970 and in particular Rule 12(1) must be read into the agreement as if they were part and parcel of what the parties have bargained for. Under Rule 12(1) (c) the appellants are accordingly bound to deliver vacant possession of the 60 terraced-lots with houses not later than 18 months after the date of signing the agreement. In the absence of any certificate by the Controller waiving or modifying the date of delivery of vacant possession under Rule 12(2) the appellants have committed a breach of contract by failing to deliver vacant possession by May 24, 1978. The application of the Act and the Rules is in fact consistent with the intention of the parties as expressed in clause 2 of the agreement.

The refusal of the respondents to sign a building contract with the appellants under clause 3 of the agreement is also justified in view of the two offending clauses referred to in the respondents' Reply to the Statement of Defence. It should be emphasized that the respondents' case has never been founded on any allegation that the first agreement is a sham, but this subsequent attempt by the appellants to contract out of the 1966 Act and the 1970 Rules even if successfully executed would be null and void and of no effect. As such the principle enunciated by Geoffrey Lane L.J. in *Aldrington Garages* v. *Fielder*[2] has no application. A device to avoid possible consequence to statutory provision is not wrong if and only if it can be done legitimately. The attempt of the appellants to contract out of the Act is clearly not a device which can be described as legitimate. It is an open defiance of the Housing Developers legislation. Having regard to the policy and objective of Housing Developers Act 1966 and the 1970 Rules made thereunder the protection afforded by this legislation to house buyers is not merely a private right but a matter of public interest which Parliament has intended to protect from being bargained away or renounced in advance by an individual purchaser (see the principle enunciated by the House of Lords in *Johnson* v. *Moreton*[3] and applied by this court in *S.E.A. Housing Corporation* v. *Lee Poh Choo*).[4] As stated by the learned Judge at page 12 of his judgment:—

> "Now the insertion by the Vendors of clauses (1) and (2) of the draft building contract was at the heart of the problems in the case, the immediate and main causes of the refusal of the Purchasers to approve and sign the draft building contract. From the undoubtedly clear meaning of the words of the disputed clauses themselves, it was a clear attempt to get around the Act and the Rules and to remove any protection available under the Act or the Rules to the Purchasers. The clauses were also inconsistent with the Act and the Rules. They were illegal or against the public policy, for to use the words of Lord Simon in *Johnson & Anor.* v. *Moreton (supra)* in connection with the attempted avoidance there of provisions of Agricultural Holdings Act, 1948 of England, that to allow such clauses to stand, 'it would be to reinstate the mischief which the statute was designed to remedy and to render the statutory provisions a dead letter'."

Accordingly, the Defence raised by the appellants in paragraph 4(ii) that they were prevented from constructing the houses as a result of the respondents' failure to enter into the building contract under clause 3 of the agreement cannot be sustained. Under clause 7 of the agreement read with the first schedule, the development price of $420,000/- which the respondents have paid must be for the clearing and levelling of the land and as well as for the construction of the infrastructure of the land in the housing scheme. The appellants have done only the clearing and levelling but not the infrastructure work which by virtue of Rule 12(1) (k) should include the construction by the appellants at their own costs of roads, driveways, drains, culverts, etc. Apart

from breach of contract for not carrying out the infrastructure work of the land and the erection of the houses, the appellants are also in breach of the statutory term of the contract for delay in the completion and delivery of vacant possession of the houses to the respondents as required by Rule 12(1)(r). Since only one terraced lot has been transferred, the appellants are liable not only for refusal to transfer the remaining 59 lots under the first agreement but also for failure to build and give vacant possession of the houses to the respondents. Mr. Sethu has submitted that the real reason for the respondents' refusal to execute the clause 3 contract is as stated in ground 3(b) of the Amended Memorandum of Appeal and not because of the two offending clauses. These have been fully set out by the learned Judge at page 7 of his judgment and we do not wish to reproduce them. We see no reason to disturb the finding of fact of the learned Judge that the actual reason for the breakdown in relationship between the two parties was due to the two offending clauses. In any event, for reasons already stated, the non-execution of clause 3 of the building contract is not at all material, and does not excuse the appellants from performing their obligation under the first agreement as supplemented by the Housing Developers legislation.

As regards the second agreement also dated November 24, 1976, it involves the sale and purchase of 25 vacant lots – 14 semi-detached and 11 bungalow lots. As in the first agreement it is also part of a larger scheme of development undertaken by the appellants on their land but unlike the first agreement, the sale is in respect of vacant developed land without any building. By paragraph 6 of the Statement of Claim, the respondents allege that the appellants are in breach of the contract for not carrying out the development or the infrastructure of the said land. The element of housing construction is therefore absent in the second agreement. It is common ground that of the 14 semi-detached lots, only one had been transferred to the respondents by the appellants. On the pleadings and evidence, the appellants have refused to transfer the remaining 13 lots because of non-payment by the respondents of excess land in four of the lots as subsequently disclosed in the subdivisional documents of title. The appellants relied on clauses 9 and 13 in their argument that the 14 lots were sold enblock and not as individual lots and as such they are entitled in refusing to transfer the remaining 13 lots until extra payments are made in respect of the four excess lots. The learned Judge rejected the appellants' arguments. We think that he is amply justified in rejecting them. Clause 9 makes provision to cover the situation where a lot subsequently found to be in excess or in deficit of the original area sold for each lot for adjustment to be made as to the purchase price of the land. Clause 13 merely provides that such adjusted payments should be settled before transfer. The undisputed facts show that out of the remaining 13 semi-detached lots still not transferred, 6 lots are not at all affected by clause 9 as no adjustment is required. In 3 of the lots, there was a deficit which means there had been overpayment made to the appellants. It is only in the 4 lots that there was excess land for which payment has not been made. The finding of the learned Judge is that the deficit or excess would appear to range between 500 and 2,393 sq. ft. and in terms of payment between $1,305 and $6,939.70. Since only 4 lots are affected, we see no reason why the 6 unaffected lots and the 3 deficit lots should not be transferred to the respondents. The 'sale by enblock' argument cannot succeed as the appellants must or ought to have known that the sale to the respondents is in fact a sale for members of the respondents' Co-operative Society and the appellants have in fact waived such right, if any, by transferring one of the 14 lots without waiting for extra payment in respect of the 4 excess lots. In our view the learned Judge was therefore right when he found the appellants to be in breach of contract for refusing to transfer the 9 unaffected lots.

As regards 10 of the 11 bungalow lots, the learned Judge also found the appellants to be in breach for not complying with clause 28 of the agreement which imposes an obligation on their part to convey lands that are "flat enough to erect a building thereon". No reasonable explanation was given why the remaining 1 bungalow lot was not transferred to the respondents. Having regard to the nature of the breach, the learned Judge was also right in holding that clause 7 of the second agreement pertaining to appellants' right to offer alternative lots does not apply. This provision only applies in the event of any alteration in the overall development of appellants' land which materially affects the lots sold to the respondents. Ten of the bungalow lots are admittedly useless commercially because of the steep terrain and not caused by any change in the overall development of appellants' land. Having paid for the full purchase price and development price of $426,300/- as agreed in the first schedule ($172,000/- land price and $254,300/- develop-

ment price) the Defence of frustration of contract raised in paragraph 7 of Statement of Defence is untenable. Such Defence cannot be raised merely because the cost of levelling 11 of the bungalow lots turns out to be $13 million and therefore too costly for the appellants. As such, the Defence raised in paragraph 7 of their pleading cannot also succeed since the appellants have no right under the agreement to offer alternative lots under such circumstances. Mr. Sethu has not seriously attacked the finding of liability of the appellants in respect of the second agreement. The appellants have clearly committed breach of contract by transfering to the respondents only one of the 25 building lots. Their failure and refusal to transfer the remaining 24 lots is a serious breach although the respondents have not all along abandoned the agreement, and are willing and able to perform their part of the contract. We must in the circumstances state clearly that there is no merit at all in the appeal against liability in respect of both agreements.

As regards the appeal against reliefs granted to the respondents for the breach of contract, the main bone of contention is that under section 14 Specific Relief Act, 1950 (Revised 1974), the learned Judge should either order specific performance or award compensation for damages for all loss resulting from the breach of contract, but not both. At the date of trial one terraced-lot under the first agreement and one semi-detached lot under the second agreement had been transferred by the appellants to the respondents. Further 10 of the bungalow lots under the second agreement are commercially useless. Hence the learned Judge in exercising his discretion was only able to order specific performance in respect of 73 out of 85 lots purchased under the two agreements viz: (i) 59 terraced-lots under the first agreement (ii) 13 semi-detached lots and 1 bungalow lot under the second agreement, the particulars of which are set out in schedule 1 of the Court Order (see pages 246-248 of appeal record). The learned Judge ordered the appellants to refund to the respondents a sum of $203,000/- in respect of the 10 useless bungalow lots *i.e.* the price paid by the respondents for the land at $8,000/- per unit and for development at $12,300/- each under the schedule to the second agreement (see page 296 of appeal record) together with interest at 4% per annum from August 9, 1978 to date of judgment and thereafter at 8% per annum until date of satisfaction. As for the remaining 15 lots under the second agreement it ordered that a sum being the difference between extra payment for excess land and excessive payment for any deficient land be paid by either party to the other party under clause 9 with liberty to apply. With regard to compensation the following orders were made:—

(a) $960,000/- damages for additional costs the respondents would have to incur in erecting 60 terraced-houses under the first agreement (4th order);

(b) $187,200/- indemnity for delay of 18 months (from June 12, 1978 to December 11, 1979) payable under Rule 12(1)(r) read with Rule 12(1)(O) of the Housing Developers Rules 1970 calculated at 8% per annum on the total contractual price of $1,560,000/- for the 60 terraced-houses under the first agreement (5th order);

(c) $117,000/- damages for increased cost of construction of 9 semi-detached lots under the second agreement calculated at $13,000/- increase per unit (6th order);

(d) $148,500/- damages for increased cost of construction in respect of 11 bungalow lots under the second agreement at $13,500/- increase per unit (6th order).

The learned Judge however did not allow the respondents' claim for damages for loss of rentals in respect of all the 85 lots for being too remote and therefore failing to measure up to the test established in the case of *Victoria Laundry (Windsor) Ltd.* v. *Newman Industries Ltd.*[5] Nor did he allow any consequential damages for loss in respect of the 10 useless bungalow lots on the ground that the contractual price of the land was in fact higher than the market price and as such no loss was in fact suffered by the respondents under this particular head of damages.

In granting damages in addition to specific performance, the learned Judge had this to say in his judgment:—

"The remedy of specific performance is discretionary, such discretion to be exercised according to well-settled rules. The right to sue for specific performance in equity is quite distinct from a cause of action at common law. Thus a breach of contract which gives rise to an action for damages is not always a prerequisite for an action for specific performance which is granted when there are circumstances justifying it. Please see the case of *Hasham* v. *Zenab* [1960] A.C. 316. Further, since law and equity are administered concurrently by our courts, this means that the Court can award damages and grant specific performance in the same case, or grant specific performance

as to part of a contract and damages as to the rest. In this connection land is always deemed by law to have a special value the loss of which may not be adequately measured or compensated by damages or money."

The distinction between cause of action at common law and equity for breach of contract is not affected in England by the Judicature Act. Although the Act enabled every Division of the High Court to give both legal and equitable remedies the effect is only on procedure. This is fully explained by Lord Blanesburgh in *Mama* v. *Sassoon.*(6) As far as our law is concerned, section 11 of the Specific Relief Act gives the discretion to the court to order specific performance in four categories of cases and section 11(2) provides that unless and until the contrary is proved, the court shall presume that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money. The burden of proof is therefore on the appellants in this case to show that the failure to transfer the various housing lots can adequately be compensated in damages, which in our view the appellants have not been able to do. The power of the court to award compensation in addition to specific performance is derived from section 18 of the Specific Relief Act 1950. Of particular relevance to this case is subsection (3) of that section which provides:—

"If in any such suit the court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly."

The following illustration is given under this subsection:—

"A contracts with B to sell him a house for $1,000, the price to be paid and the possession given on the 1st January. A fails to perform his part of the contract, and B brings his suit for specific performance and compensation, which is decided in his favour. The decree may besides ordering specific performance, award to B compensation for any loss which he has sustained by A's refusal."

Thus, in the present case the learned Judge has the discretion to order specific performance of the transfer of the 59 terraced lots under the first agreement, and to satisfy the justice of the case he can, unless section 14 applies, also award the respondents compensation for any consequential loss which they have sustained as a result of the breach. The same applies to the second agreement except for the 10 useless bungalow lots for which the learned trial Judge has in the exercise of his discretion ordered a refund of the purchase price instead of specific performance. Since the first agreement is a housing development contract under the Housing Developers Act, the respondents are also statutorily entitled to an indemnity for delay under Rule 12(1)(r) of the 1970 Rules.

One of the exceptions to section 11 is section 16 which prohibits specific performance of a part of a contract unless the case comes under section 13 or 14 which deals with indivisible contract or section 15 which deals with divisible contracts. Whether a contract is indivisible or divisible must of course depend on the facts of each particular case, the terms of the contract and the nature of the property. Mr. Sethu did not refer to sections 11 and 18. His argument is purely based on section 14 which he says is the correct section to be applied in this particular case and as such the learned Judge must elect either to grant specific performance of the transfer of the various lots to the respondents or award compensation for damages but not both. Section 14 provides:—

"Where a party to a contract is *unable* to perform the whole of his part of it, and the part which must be left unperformed forms a considerable portion of the whole, or does not admit of compensation in money, he is not entitled to obtain a decree for specific performance. But the court may, at the suit of the other party, direct the party in default to perform specifically so much of his part of the contract as he can perform, provided that the plaintiff relinquishes all claim to further performance, and all right to compensation either for the deficiency, or the loss or damage sustained by him through the default of the defendant."

It must be obvious that not all claims for specific performance must come under section 16, and whether a case properly falls under section 13, 14 or 15 must again depend on the facts of each particular case. For the purposes of sections 13 and 14, the appellants must be unable to perform the whole of their part of the contract *i.e.* they are able and willing to perform only part of the indivisible contract. If the part which must be left unperformed bears only a small proportion in value to the whole contract and admits of compensation in money, then section 13 applies, and the court may direct specific performance of so much of the contract as can be performed and award compensation in money for the deficiency. But where the part of the indivisible contract which must be left unperformed is large or does not admit of compensation in money, the case comes under section 14 and the court cannot order both specific performance and compensation. The court however may order specific

performance at the instance of the plaintiff provided he renounces all rights to damages and to further performance. On the other hand section 15 deals with divisible contracts. The question for determination is whether the present two agreements under consideration come under section 14. As far as the first agreement is concerned, Mr. Sethu says it comes under section 14 because a part of the contract which the appellants were unable to perform *viz.* the construction part forms a considerable portion of the whole contract and therefore the respondents should not be entitled to specific performance of the part which they could perform *viz.* the transfer of the land titles, unless the respondents agreed to relinquish all claim to further performance and all right to compensation for any loss or damage sustained by them. In short, the court having ordered specific performance of the transfer of the various lots should not in addition award damages. In our view there is a fallacy in that argument. Admittedly, no one can dispute that in the first agreement the part of the contract relating to the construction of the houses forms a considerable and indeed a major portion of the housing development contract. But that by itself is insufficient to bring the case under the provision of section 14. We are dealing with a housing development contract where the appellants/vendors can but are unwilling to convey both the lands and houses *i.e.* they are unwilling and not unable to perform the whole contract. It is not a case where for some reasons or other they are unable through really no fault of their own to perform the whole contract in which case the court may nevertheless at the suit of the plaintiff direct the party in default to perform specifically so much of his part of the contract as he is able to perform. Section 14 is one of three exceptions to the rule which prohibits the remedy of specific performance of a part of a contract. In this context, section 14 must be read together with sections 13, 15 and 16. These four sections constitute a separate code within the Specific Relief Act and the language of each section must prevail. As stated by Lord Sumner in *Graham* v. *Krishna Chunder Dey*:—[7]

"Sections 14 to 17 inclusive of the Specific Relief Act, 1877 (which are equivalent to our sections 13 to 16) are both positive and negative in their form. Taken together they constitute a complete code, within the terms of which relief of the character in question must be brought, if it is to be granted at all. Although assistance may be derived from a consideration of cases upon this branch of English jurisprudence, the language of the section must ultimately prevail. Section 17 prescribes that there shall be no grant of specific performance except in cases coming within one or other of the three previous sections."

Thus, in *Parthasarathi* v. *Venkata Kondiah*,[8] the appellant entered into a contract to sell two items of immovable property, but it was later found that the contract was incapable of performance as the vendor had no title to sell one of the items, and this item formed a considerable portion of the whole property. The purchaser relinquished his claim for further performance in respect of this item of property. It was held that section 15 of the Indian Specific Relief Act (which is equivalent to our section 14) applied to the case, since the vendor was actually unable to perform the whole contract and not because he was unwilling to perform in total breach of the contract. Whereas in this case, Mr. Sethu says the lapse of time and the Housing Developers Act are the inabilities which prevent the appellants from performing the whole contract. We fail to understand how these two factors can constitute inabilities. The delay was due to the appellants' own conduct in trying to vary the terms of the first agreement by introducing two clauses in the proposed clause 3 of the contract and as well as to contract out of the Housing Developers Act and Rules. The Act came into force on August 29, 1969 well before the first agreement was executed in 1976 and they could not be taken by surprise by the Act. As stated earlier, it is not a case where the appellants are unable to perform the whole contract but they are able but unwilling to do so on account of the disharmonious negotiations culminating in the respondents' refusal to abandon the statutory protection given to them by the Housing Developers legislation as purchasers of housing accommodation. Section 14 of the Specific Relief Act is enacted for the benefit of the purchaser and cannot operate to his detriment (see *Sultan Kani Rowthen* v. *Md. Meera Rowthen)*[9] . We agree with Mr. Humfrey Ball's submission that this is a case where both parties are able to perform the whole of their respective obligations. The respondents are able and willing to perform their part but the appellants are unwilling though able to perform their part of the bargain. We have been referred to the case of *Hiralal Lachmiram Pardeshi* v. *Janardan Govind Nerlekar* [10] where in holding that section 15 of the Indian Specific Relief Act did not apply, Broomfield J. at page 136 said:—

"Sections 14 and 15, Mr. Thakor says, should be confined to the case where the inability to complete the contract is due to a legal defect such as want of title, whereas, here defendant 1 has not parted with any legal

interest in plot (d). There are merely equities arising in favour of defendant 2. Whether this is so as matter of fact the record does not show. As I have mentioned, the decree of September 1 1930, directed a sale deed to be executed within fifteen days. But, apart from that, this argument, although undoubtedly ingenious, is, in our opinion, unconvincing. The question before the Court in such a case must always be whether the contract can be executed in substance."

We do not think the above opinion of Broomfield J. can carry the appellants' argument any further having regard to the facts of the above case. In that case A who owned four plots (a), (b), (c) and (d), agreed to sell plot (d) to B for a certain price. Later on, A agreed to sell all the four plots to P. B filed a suit against A claiming specific performance of the agreement in respect of plot (d) and P also filed a suit claiming specific performance of all the four plots. P was unwilling to purchase plots (a), (b) and (c) only, without compensation for A's inability to convey the plot (d) to him. It was held that A by reason of his prior agreement with B was just as much unable to carry out the whole of his part of the original agreement within the meaning of sections 14 and 15 as if he had no legal title to plot (d). Section 15 (which is equivalent to our section 14) was held to be not applicable.

In our case the first agreement can in substance be performed, and there is no legal impediment to prevent the appellants from transferring the land with houses. In *Hiralal Lachmiram* case *(ante)* the vendor could not sell the plot to the purchaser because it had been sold to a previous purchaser. We therefore reject the argument that the delay that has occurred and the Housing Developers Act constitute 'inabilities' under sections 13 and 14 of Specific Relief Act. We therefore find that section 14 does not apply to the facts of the present case.

On the issue of liability we have decided that the first agreement is binding as a housing development contract and that its enforceability does not depend on the execution of the proposed clause 3 of the building contract. Be that as it may we are of the view that the first agreement is a divisible contract in that its terms draw distinction between the subdivided lots and the terraced houses to be built on them. Separate prices are provided for in the first schedule in respect of land and houses and each part appeared to stand on a separate and independent footing so as to be within the terms of section 15. The housing construction part is governed primarily by terms and conditions provided by Rule 12(1) of the Housing Development (Control and Licensing) Rules which are deemed to be incorporated in the agreement; whereas the terms governing the subdivided lots are almost wholly spelt out by the terms of the written agreement itself. Section 15 provides:—

"When a part of a contract which, taken by itself, can and ought to be specifically performed, stands on a separate and independent footing from another part of the same contract which cannot or ought not to be specifically performed, the court may direct specific performance of the former part."

On the facts of the present case, the part of the first agreement dealing with the subdivided lots can and ought to be specifically enforced as it stands on a separate and independent footing from the construction part which cannot or ought not to be specifically enforced. Thus on the part which can be specifically enforced, the court can in addition award damages in appropriate cases under section 18(3). Whether a contract is divisible or not must depend on the particular circumstances of each case, the terms of the contract and the nature of the property (see *Harendra* v. *Nandala*).[11] The distinction between the Privy Council case of *Graham* v. *Krishna Chunder Dey (ante)* and our case is this. In the *Graham case* two plots of lands were sold at one price and the other terms of the contract also dealt with the two plots together. Thus not only the price but the other terms were indivisible. Whereas in the first agreement of our case the contract draws distinction between the land and the construction part. Not only the price but the other terms are divisible and based on a separate and independent footing. As stated earlier the lands are mainly governed by terms provided in the instrument itself whereas the construction part is principally governed by terms and conditions incorporated into the agreement by the Housing Developers legislation. In relation to our section 15 (which is equivalent to section 16 of the Indian Specific Relief Act 1877 which has since been repealed by the Specific Relief Act 1963), Lord Sumner had this to say at pages 92 and 93:—

"Accordingly, section 16 (which appears to be novel in the width of the power which it confers) afforded the only ground on which the Court could help him. To make this section applicable it had to be shown that there was a part of the contract, to wit, that relating to plot A, which (a) 'taken by itself could and ought to be specifically performed,' and (b) 'stood on a separate and independent footing' from the other part of the contract, which admittedly could not be performed.

Their Lordships think (1) that before a Court can exercise the power given by section 16 it must have before it some material tending to establish these propositions, and cannot apply the section on a mere surmise that, if opportunity were given for further inquiry, such material might be forthcoming and possibly might be found to be sufficient; and (2) that the words of the section, wide as they are, do not authorize the Court to take action otherwise than judicially, and in particular do not permit it to make for the parties or to enforce upon them a contract, which in substance they have not already made for themselves."

One of the underlying principles in the Privy Council judgment is the reluctance of the court to rewrite a contract for the parties. In that case, two judges of the Indian High Court had allowed an appeal and held that section 16 (our section 15) applied, but since there was no evidence before them of the value or character of the two plots, they remitted the case to the trial judge in order that he might take evidence and assess the abatement of price to be allowed in respect of the failure to make title to one of the plots. The Privy Council allowed the appeal and restored the judgment of the trial judge in holding that section 16 did not apply. If the effect of granting specific performance is to enforce upon the parties a new contract as to the price or other terms which go the root of what they have already bargained for themselves, then the court would refuse to make the section applicable. Applying the test laid down by Lord Sumner to the facts of the present appeal, it is self-evident that there is a part of the first agreement *viz.* the transfer of the terraced lots "taken by itself could and ought to be specifically performed", and secondly, this particular part of the contract "stood on a separate and independent footing" from the other part of the contract, to wit, the construction part which clearly could not and should not be specifically performed as it would involve the court in lengthy and laborious supervision as to its performance.

For the same reasons, section 14 does not apply to the second agreement although it concerns only the sale of vacant land. It can therefore be specifically enforced under section 11 and in addition damages can be awarded under section 18(3). In respect of the 10 useless bungalow lots, we think the learned Judge has exercised his discretion judicially by not ordering specific performance but instead ordering the appellants to refund the contractual price and also awarding consequential damages arising from the breach of contract.

This ground of appeal that the respondents are not entitled to specific performance as well as compensation for damages must therefore fail.

As regards appeal against quantum of damages, the argument of the appellants is that the respondents have in fact not suffered any loss under the first agreement on the ground that the submission of plans was held up by the respondents. As stated elsewhere in this judgment, we find no reason to disturb the finding of fact by the learned Judge that the real cause of breakdown of relationship between the two parties is the failure of the appellants to persuade the respondents to agree to the two offending clauses in the proposed clause 3 contract. As regards the argument that indemnity under Rule 12(1)(r) only applies where the building has been completed but delivered late, we find such interpretation is contrary to the intention of the legislature. Under Rule 12(1)(r) the appellants as a licensed housing developer are liable to indemnify the respondents for delay in delivery of vacant possession of the housing accommodation. The amount of indemnity shall be calculated from day to day at the rate of not less than 8% per annum of the purchase price commencing immediately after the date of delivery of vacant possession as specified in the contract of sale. Since the date of such delivery is not specified in the first agreement, it must be deemed in accordance with Rule 12(1)(o) to be not less than 18 months after the date of signing of the first agreement. Mr. Sethu however submits that for Rule 12(1) to apply, the vendor must be a licensed housing developer. The licence is issued on the basis of a particular project. It is put forward in argument that the appellants have a licence over Lot 3902 but excluding the portions sold to the respondents. In our view this argument fails to take into account the acknowledgment in clause 9 of the first agreement that the property sold formed part of the overall development of the "said land" which by virtue of preamble (A) has reference to Lot 3902 comprising the whole area of approximately 49.8 acres. Since the appellants have been issued with a licence over the whole of that Lot, it must, in our view, include the property sold which only formed a small part of the whole area. With regard to the second agreement, the appellants, naturally agree with the order to refund the price in respect of the 10 useless bungalow lots and with the learned Judge for making no order for damages on the ground that the contractual price is higher than the market price even at the time of breach. As to the refusal of the respondents to accept alternative lots we have already given our reasons why clause

7 of the second agreement does not apply. The appeal against quantum by the appellants must therefore fail.

We now deal with the cross-appeal of the respondents. The first ground of appeal is that the indemnity under Rule 12(1)(r) ought to be calculated not for a period of 18 months only from December 12, 1979 but should at least be up to January 21, 1984 – date of judgment. This is a statutory relief given for delay in giving vacant possession and as such the learned Judge is justified in assessing the indemnity for 18 months only on the basis that if the appellants had commenced building the terraced-houses on June 12, 1978 i.e. two months after appointing themselves as the licensed developer under the first agreement, the construction work would have been completed within 18 months as envisaged by Rule 12(1)(o), and therefore they would have been in a position to deliver vacant possession by December 11, 1979. As such the argument that the appellants had used respondents' money for several years should not arise since the basis of calculating the indemnity must necessarily assume that the money paid by the respondents had been expended by the appellants before the houses could be constructed. The fact that the said sum of $1,146,000/- is far in excess of the 10% deposit permissible to be demanded under the Housing Developers legislation should also not be taken into account in assessing the indemnity. We therefore reject this ground of appeal.

The next ground concerns the interest on the refund of $203,000/- i.e. the contract price for the 10 useless bungalow lots under the first schedule to the second agreement (see page 296 of appeal record). The learned Judge has awarded interest on this sum at the rate of 4% per annum from August 9, 1978 (being the date on which the balance of such contract price was paid by respondents) to date of judgment – January 21, 1984 and thereafter at 8% per annum until date of satisfaction. It is submitted on behalf of the respondents that the learned Judge ought to have awarded 13% per annum instead of a mere 4%. We find no merit in this ground of appeal in the absence of any evidence that 13% to 13.5% are the current interest rates applicable to borrowers of money from commercial banks. Having ordered the refund, we think it is only right that specific performance of the 10 alternative bungalow lots offered under clause 7 should not be ordered. Further, clause 7 of the second agreement (which is identical with clause 9 of the first agreement) could not be invoked in this particular case for reasons already stated elsewhere in this judgment. We accordingly find no merit also in this ground of appeal.

The next ground of appeal relates to the award of $117,000/- damages being the increased cost of construction for the 9 semi-detached bungalows at $13,000/– per unit. It is argued for the respondents that the learned Judge ought to have awarded $169,000/- under this head of damages since 13 units were involved and not merely 9. In our view the 4 units were rightly excluded since there was excess land in these lots for which the respondents have not paid as required under clause 9 of the second agreement. This ground must also fail.

Lastly, it is argued that all sums paid by the respondents towards development charges should be refunded as no development work has in fact been carried out. As acknowledged by the respondents, the appellants must have done work in clearing and levelling the various lots except levelling of the 10 useless bungalow lots. Since specific performance has been ordered for the transfer of 73 out of 85 lots purchased, and damages awarded on the assumption that the houses could be erected thereon, we are of the view that this ground of appeal should also be rejected. Under section 18(4) Specific Relief Act, the method of assessing damages is left to the discretion of the trial Judge. Since the method has not been shown to be wrong in principle, his award must stand.

From the learned Judge's 35-page painstaking judgment, we are satisfied in this case that there is no merit in this appeal both on the issues of liability and quantum of damages. The learned Judge did not err in law or in fact. In the circumstances, we dismiss both the appeal and cross-appeal with costs. The deposit shall be paid to the respondents on account of taxed costs.

Appeal and cross-appeal dismissed.

Solicitors: *Shook Lin & Bok; Saraswathy Devi.*